Supreme Court, U.S.
FILED
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No.

IN THE

# Supreme Court of the United States

PETER PI and COR-BON
CUSTOM BULLET COMPANY,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where an indictment has been dismissed because the defendant did not commit the offense charged, does the doctrine of *res judicata* bar re-indictment of the defendant upon the same facts but a different charge?

## STATEMENT PURSUANT TO RULE 29.6

Petitioner, Cor-Bon Custom Bullet Company, has no parent companies and there are no publicly held companies that own 10% or more of its stock.

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Petitioners, Peter R. Pi and Cor-Bon Custom Bullet Company, Inc., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Pi*, __ F.3d __, 1999 WL 198418 (6th Cir. 1999) (App. A). The order of the District Court in *United States v. Pi*, Crim. No. 97-CR-80681 (E.D. Mich. Jan. 7, 1998) (App. B) is unpublished.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 12, 1999. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case turns upon the correct application of the common law doctrine of *res judicata*. There are no constitutional or statutory provisions directly involved in this case.

## STATEMENT OF THE CASE

On or about June 26, 1997, Peter R. Pi and his company, Cor-Bon Custom Bullet Company, were indicted for willfully failing to collect, account for and pay the tax on

shells and cartridges, in violation of 26 U.S.C. § 7202. But Mr. Peter Pi and his company did not have a duty to collect, account for and pay the tax in question, so they moved to dismiss the indictment. The United States consented to dismissal of the indictment. The District Court dismissed the indictment.

Then the United States had Mr. Pi and his company again indicted. The second indictment charged Mr. Pi and his company with willfully attempting to evade or defeat the tax on shells and cartridges or the payment thereof, in violation of 26 U.S.C. § 7201 (the Government characterizes the second indictment as the "first superseding indictment," but this is incorrect, as the first indictment was dismissed). The same facts underlie both indictments; only the legal theories are different.

Mr. Pi and his company moved to dismiss the second indictment as *res judicata*. The District Court denied that motion, and the defendants appealed. The Sixth Circuit's opinion affirming the District Court limits the common law doctrine of *res judicata* and rejects this Court's opinion in *United States v. Oppenheimer*, 242 U.S. 85 (1916). Accordingly, Mr. Pi and his company petition this Court for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S OPINION BELOW ABJURES THE SUPREME COURT'S HOLDING IN *OPPENHEIMER* AND LIMITS THE COMMON LAW DOCTRINE OF *RES JUDICATA*.

In *United States v. Oppenheimer*, 242 U.S. 85 (1916), a grand jury indicted Oppenheimer for conspiracy to commit bankruptcy fraud. Oppenheimer moved to quash the indictment on the ground that the one-year statute of limitations of § 29d of the Bankruptcy Act of 1898, Act of July 1, 1898, c. 541, § 29d, 30 Stat. 544, 554, had expired on the offense. The Government apparently consented to the motion to quash. The District Court granted the motion.

Then this Court issued its opinion in *United States v. Rabinowich*, 238 U.S. 78 (1914), which held that the one-year statute of limitations of § 29d of the Bankruptcy Act of 1898 did not apply to the offense of conspiracy to commit bankruptcy fraud. Then the Government had Oppenheimer indicted again on the same facts, and Oppenheimer moved to quash the second indictment. Oppenheimer argued that the dismissal of the first indictment was *res judicata* as to the second. This Court agreed with Oppenheimer. Writing for a unanimous Court, Justice Holmes said:

> It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a

> judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empaneled.

242 U.S. at 87. Indeed, the present case is a better one than *Oppenheimer* for application the doctrine of *res judicata*. In the present case, the first indictment was dismissed not because the statute of limitations had expired upon the offense charged, but because the defendants *did not commit* the offense charged.

*Res judicata* precludes not only matters that were adjudicated in the earlier proceeding, but also matters that might properly have been presented in that proceeding. In *Lipscomb v. United States*, 226 F.2d 812 (8th Cir. 1955), *cert. denied*, 350 U.S. 971, *reh'g denied*, 350 U.S. 1003 (1956), a prisoner moved under 28 U.S.C. § 2255 to vacate his conviction. The Eighth Circuit noted that the movant had filed an earlier motion seeking the same relief albeit upon different contentions, and that the District Court had denied the earlier motion. In holding that the denial of the first motion was *res judicata* as to the second, the Eighth Circuit said:

> The same relief was sought in [the earlier] motion as in the motion here under consideration and the contentions now presented could have been urged in that proceeding as there is no claim that they arose subsequent thereto and the decision in that proceeding is binding on the defendant not only as to the contentions there made but as to all other contentions which could have been made.

In the course of our opinion in *Mitchell v. Village Creek Drainage Dist.*, 8 Cir., 158 F.2d 475, 477, it is said:

> It is elementary that *res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as to any other available matter which might have been presented to that end. [Citations omitted].

226 F.2d at 816-17. *See also Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940); *Anselmo v. Hardin*, 253 F.2d 165, 168 (3d Cir. 1958). Put another way, a final judgment on the merits in one action is *res judicata* as to another action between the same parties or their privies if the two actions arise out of the same nucleus of operative fact. *E.g., Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir.), *cert. denied*, 498 U.S. 823 (1990); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38-39 (2d Cir. 1992). *See also Yawn v. United States*, 244 F.2d 235, 237 (5th Cir. 1957) (quoting *Serio v. United States*, 203 F.2d 576, 578 (5th Cir.), *cert. denied*, 346 U.S. 887 (1953) ("[T]he same facts can not be twice litigated by the same sovereign against the same defendant")).

In *The Queen v. Miles*, 24 Q.B.D. 423 (1890), cited by Justice Holmes in *Oppenheimer*, Miles was charged with *unlawfully assaulting and beating* Charles Living. The case against Miles was discharged under the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 16, which provides in part:

> If upon the hearing of a charge for an offense punishable upon summary conviction, the Court of Summary Jurisdiction think that, though the charge is proved, the offense was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a noncriminal punishment[,] . . . [t]he Court, without proceeding to conviction, may discharge the information.

Later, Miles was indicted on a five-count indictment arising out of the same incident with Living. Count one charged Miles with *unlawfully and maliciously wounding* Living. Count two charged Miles with *inflicting great bodily harm* upon Living. Count three charged Miles with *assaulting* Living, and *beating, wounding, and ill-treating* him, *thereby occasioning* to him *great bodily harm*. Count four charged Miles with *beating, wounding and ill-treating* Living. The fifth count had been dismissed. The Queen's Bench Division was of the unanimous opinion that the later indictment had to be quashed because of the earlier adjudication upon the same facts.

Similarly, in the case before the Court, the same facts underlie both indictments. Only the legal theories are different. As the adjudiciation in the earlier case was *res judicata* as to the later case in *Miles*, the dismissal of the first indictment is *res judicata* as to the second indictment in the case before the Court.

The Court of Appeals in this case limited the doctrine of *res judicata* in criminal cases to the bounds of the Fifth Amendment protection against double jeopardy: "The doctrine of *res judicata* bars subsequent litigation between

parties on matters that have previously been fully and finally adjudicated because of the double jeopardy clause guarantee against being twice put to trial for the same offense." Slip Op. at 6-7. If this position is the law, then dismissal of an indictment pretrial can never have *res judicata* effect. The Supreme Court expressly rejected this position in *Oppenheimer*:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

242 U.S. at 88. Similarly, in *Yawn v. United States*, 244 F.2d 235, 237 (5th Cir. 1957), the Fifth Circuit said that "[w]hile *res judicata* is related to double jeopardy and in certain cases my have an identical effect, [citations omitted], it may have determining effect in situations where double jeopardy is unquestionably inapplicable."

Because the Court of Appeals in this case elected not to follow the Supreme Court's holding in *Oppenheimer*, thereby limiting the common law doctrine of *res judicata*, this Court should grant the Petition.

## II.

## THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' OPINION IS NOT WELL-FOUNDED IN LAW.

The Court of Appeals relied upon three cases and a court rule in holding that the dismissal of the first indictment was not *res judicata* to the second. The opinion in *United States v. Senak*, 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973), does not disclose the factual allegations of the two indictments. Moreover, the only ground relied upon by the defendant in moving to dismiss the second indictment was double jeopardy; *res judicata* is not mentioned in the opinion.

*United States v. Root*, 366 F.2d 377 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967), was a prosecution for the kidnapping of Frank Sinatra, Jr. Count One of the indictment charged conspiracy. Count Two charged interstate transportation of the kidnap victim. Counts Three through Five charged separate transmissions in interstate commerce of ransom communications, and aiding and abetting. Count Six charged possession of the ransom money. The District Court correctly held that dismissal of Count One was not *res judicata* as to the remaining counts. Obviously, the conspiracy count in *Root* involved facts (an agreement and an overt act in furtherance thereof) different from those of the target offenses, and therefore that the dismissal of Count One could not have *res judicata* effect as to Counts Two through Six. It is well-settled that where counts of the same indictment charge offenses involving different facts, an acquittal on one count is not *res judicata* as to the others. *E.g., Dunn v. United States*, 284 U.S. 390,

393 (1932) (Holmes, J.). *See also United States v. Woodell*, 285 F.2d 316, 317 (4th Cir. 1960); *United States v. Perrone*, 161 F. Supp. 252, 260-61 (S.D.N.Y. 1958). These cases have absolutely no relevance to the present case because District Court below dismissed all of the counts of the first indictment. Moreover, all eighteen counts of the first indictment below involve exactly the same facts.

In *Robinson v. United States*, 284 F.2d 775 (5th Cir. 1960), the United States indicted Robinson for illegal possession and concealment of non-tax-paid whiskey. The indictment resulted from information reported to the United States Attorney's office in Jacksonville by a local police officer, Anderson. Anderson had seized the whiskey on a search warrant, arrested Robinson, and initiated a criminal proceeding against Robinson in the Florida courts. The United States District Court of the Southern District of Florida stayed its hand and dismissed the indictment on "grounds of public policy." The District Court found that "it would be unseemly for both the state and federal governments to move forward at the same time against the same man for what amounted to the same crime." 284 F.2d at 775.

Some time later the United States Attorney learned that he and the Federal District Court had been misinformed as to the facts on which its dismissal was based. The true facts were called to the attention of the Federal District Court, and Robinson was re-indicted. In affirming Robinson's conviction, the former Fifth Circuit said:

> We note that the motion to dismiss the first indictment did not attack the indictment with respect to its sufficiency or with respect to any

> point that might exculpate the defendant. The objection was based on principles of comity. The court's application of the principles was based on misinformation. *See United Sates v. Janitz*, 3 Cir., 1947, 161 F.2d 19 and *Untied States v. Gaskin*, 1944, 320 U.S. 527, 64 S. Ct. 318, 88 L. Ed. 287.

284 F.2d at 776. In the case presently before the Court, in contrast, there are no principles of comity at issue. Nor was the District Court below misinformed in dismissing the first indictment. Rather, the District Court dismissed the first indictment in this case *because the defendants did not commit the crimes charged.*

Finally, the Court of Appeals said that "Fed. R. Crim. P. 12(h) provides that an indictment dismissed because of a defect may be superseded by a new indictment." Slip. Op. at 7. Fed. R. Crim. P. 12(h) provides in pertinent part:

> If the court grants a motion *based on a defect in the institution of the prosecution or in the indictment* or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information.

(Emphasis added). The Supreme Court recognized this principle in *Oppenheimer*: "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one. . . ." 242 U.S. at 87. But in the same sentence the Court said that "a judgment for the defendant upon the ground that the prosection is barred [by the statute of limitations] goes to his liability as a mater of substantive law and one judgment

that he is free as matter of substantive law is as good as another." *Id.* An indictment might be defective, for example, if it omits an element of the offense charged. *E.g.*, *Lee v. United States*, 432 U.S. 23 (1977). But the first indictment below was fair on its face. It set forth 26 U.S.C. § 7202 verbatim eighteen times. In dismissing the first indictment, the District Court freed defendants therefrom as a matter of substantive law. Clearly, the dismissal of the first indictment in this case is *res judicata* as to the second. Because the Court of Appeals' opinion is not well-founded in law, this Court should grant the Petition.

## III.

## THE PETITION SHOULD BE GRANTED BECAUSE THE HOLDING OF THE COURT OF APPEALS DOES NOT REFLECT SOUND PUBLIC POLICY.

Peter Pi's family suffered the uncertainty of an indictment which threatened the liberty of their husband, father and breadwinner. Peter Pi lived with the uncertainty of not knowing what would happen to his business in the event he lost his liberty. Then the indictment was dismissed as a matter of substantive law.

The Government is the master of its indictment. It could have indicted Peter Pi under 26 U.S.C. §§ 7201 and 7202 or under § 7201 alone. It chose to indict under § 7202 alone. That indictment was dismissed as a matter of substantive law. The Government should live with the consequences of its election.

Now Peter Pi and his family are again under the cloud of a prosecution. The Government has re-indicted Peter Pi on the same facts but a different charge.

*Res judicata* is "a rule of fundamental justice and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). *See also Wilson v. United States*, 166 F.2d 527, 529 (8th Cir. 1948).

Because the failure of the Court of Appeals to give effect to the doctrine of *res judicata* is unsound in public policy, this Court should grant the Petition.

## CONCLUSION

The doctrine of *res judicata* requires parties to litigate all of their claims against each other in one proceeding. This important doctrine serves the interests of judicial economy and private peace. The Court of Appeals' opinion abjures this Court's opinion in *United States v. Oppenheimer*, 242 U.S. 85 (1916), and limits the common law doctrine of *res judicata*. Accordingly, Mr. Pi and his company respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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